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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. FRANK VARGAS, Defendant and Appellant.	B170180 (Los Angeles County Super. Ct. No. NA057494)

APPEAL from a judgment of the Superior Court of Los Angeles County. Arthur Jean, Jr., Judge. Affirmed.

Adam Axelrad, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Margaret E. Maxwell and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Frank Vargas appeals following his conviction by a jury of possession of rock cocaine. (Health & Saf. Code, § 1350, subd. (a).) The court found true the prior conviction and prison term allegations. (Pen. Code, §§ 667.5, subd. (b), 667, subds. (b)–(i), 1170.12, subds. (a)–(d).) Appellant was sentenced to a total prison term of five years. Contrary to appellant's contentions, (1) there was substantial evidence of a usable quantity of cocaine, and (2) the trial court did not abuse its discretion in admitting the lab report and the criminalist's testimony.

FACTS

On June 19, 2003, in the late evening, Long Beach Police Detectives Robert Gonzales and Mark Sisneros noticed appellant talking to a juvenile on the sidewalk at 10th Street and Gardenia Avenue. Appellant looked at the officers, immediately stopped talking, and began to walk away. The officers drove their unmarked car up alongside of appellant, and Detective Sisneros asked to speak with appellant. Appellant walked toward the detectives' car.

Detective Sisneros frisked appellant and found in his left front pants pocket a Camel cigarette box. The detective saw that the lid of the cigarette box was open and a napkin was inside. When the detectives asked appellant if the box contained "his crack pipe," appellant replied "yes." The detectives found inside the cigarette box a small glass pipe of the type often used for smoking rock cocaine. The pipe was burned on one end.

Detective Gonzales asked appellant if he had any drugs on him, and appellant answered "no." The detective asked appellant if he could search him. The detective also asked appellant if he would open his mouth because he noticed appellant was talking strangely, and because it is common for a person to place contraband in his mouth to hide it from the police. Appellant opened his mouth, and Detective Gonzales shined a flashlight into his mouth. The detective saw a small item that looked like a piece of plastic on the left side of appellant's mouth.

Detective Gonzales asked appellant to spit it out, and appellant complied. As the detective stepped back to illuminate the item with his flashlight, appellant smashed it into

the ground with his foot. Detective Gonzales then restrained appellant and placed handcuffs on him. Detective Sisneros retrieved the item and identified it as an off-white substance consistent with rock cocaine. Subsequent laboratory tests revealed that the item appellant spit out was a substance containing cocaine and weighing .25 grams.

At trial, appellant presented no evidence on his own behalf.

DISCUSSION

I. Substantial evidence establishes that appellant possessed a usable quantity of cocaine.

It is well settled that when reviewing a judgment for sufficiency of the evidence, the appellate court must "'review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence--that is, evidence which is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'" (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138; see also *People v. Tenner* (1993) 6 Cal.4th 559, 567.) "The reviewing court presumes in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence." (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208.) Circumstantial evidence may be sufficient to prove a defendant's guilt beyond a reasonable doubt. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1329.)

To sustain a conviction for possession of contraband the evidence must establish, in pertinent part, that the substance was in an amount sufficient to be used as a controlled substance. (*People v. Rubacalba* (1993) 6 Cal.4th 62, 64-65.) Whether contraband exists in a sufficiently usable quantity is a question of fact. (*People v. Leal* (1966) 64 Cal.2d 504, 512.) A usable amount of a controlled substance is an amount sufficient to be used in any manner customarily employed by users of the substance. (*People v. Piper* (1971) 19 Cal.App.3d 248, 250.) However, no witness need specifically opine that the amount in question was a usable quantity (*People v. Stafford* (1972) 28 Cal.App.3d 405, 413-414), nor need any particular purity or narcotic effect be proven. (*People v. Rubacalba*, *supra*, 6 Cal.4th at p. 66-67.) And our Supreme Court has emphasized that the "usable

quantity rule prohibits conviction only when the substance possessed simply cannot be used, such as when it is a blackened residue or a useless trace." (*Id*. at p. 66.)

In the present case, the detective picked up off the ground the .25 grams of a rock-like substance containing cocaine that appellant had discarded and attempted to destroy. Thus, the detective's ability to retrieve it and appellant's own actions in concealing it and then trying to destroy it indicate that the amount in question was indeed a usable quantity. (See, e.g., *People v.* Hardin (1983) 149 Cal.App.3d 994, 999; *People v.* Perry (1969) 271 Cal.App.2d 84, 97.) Further supporting the ineluctable conclusion that the amount was a usable quantity is that appellant was in possession not only of this rock cocaine but also a glass pipe, which could be used to smoke the .25 grams in question. (See *People v. Rubacalba*, *supra*, 6 Cal.4th at pp. 64, 66.)

Accordingly, circumstantial evidence and reasonable inferences therefrom reveal that the contraband retrieved was not a mere useless residue, but rather constituted a usable quantity of cocaine sufficient to support appellant's conviction.

II. The trial court did not abuse its broad discretion in admitting into evidence the lab report and the criminalist's testimony.

During trial, the prosecution offered into evidence a police department lab report prepared by a criminalist and presented the testimony of Elana Quinones, a criminalist who did not personally prepare the report but was employed at the crime lab. Over defense objection, the lab report was admitted into evidence to establish that the item appellant attempted to destroy was .25 grams of a substance containing cocaine. The lab report was introduced under the business records exception to the hearsay rule.

Appellant contends the trial court abused its discretion because the prosecution did not lay an adequate foundation for admission of the evidence. However, the report was properly admitted, as it constituted both a business record exception and a public records exception to the hearsay rule. (Evid. Code, §§ 1271, 1280.)

The trial court properly admitted the report as a business records exception to the hearsay rule.[1] The proponent of such evidence has the burden of establishing the foundation for its admission. (*People v. Diaz* (1992) 3 Cal.4th 495, 534-535.) But the trial court's ruling to admit evidence under the business records exception to the hearsay rule is reviewed on appeal for abuse of discretion. (*People v. Beeler* (1995) 9 Cal.4th 953, 978-979.)

Appellant contends the prosecution failed to establish the necessary foundation for the admission of the challenged evidence because Quinones did not testify as to (1) when the lab report was prepared, (2) whether or not it was prepared at or near the time of the testing, or (3) how the report was prepared. Although Quinones admitted she was not present for any of the testing done on the substance found on appellant and was not involved in the preparation of this particular lab report, she did establish the necessary foundation for admission of the report.

Quinones was employed as a criminalist in the same crime lab as the criminalist who tested appellant's rock cocaine. The both worked in the narcotics unit; she had worked there for approximately three years, had performed approximately a thousand controlled substance tests, and had been trained by that other criminalist. Quinones testified that when a substance arrives at the lab for analysis, the procedure is to examine the substance, photograph it, weigh it, and perform an analysis upon it. Based upon the notes taken during this process, a final lab report is prepared. Quinones further explained

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[1] Evidence Code section 1271 provides as follows: "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if: (a) The writing was made in the regular course of a business; (b) The writing was made at or near the time of the act, condition, or event; (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

that the lab procedures described in her testimony are followed by all other criminalists in the lab when testing controlled substances.

At trial, the prosecution offered a photograph taken of the substance, evidence of the weight of the substance, and the conclusion that it contained cocaine. The evidence thus established that the criminalist who actually tested the substance conformed his specific procedures to the general lab procedures outlined by Quinones. Quinones also identified the lab report, and recognized the signature of the criminalist who actually prepared the report. She explained that the report was from a computer-generated form using a template that all criminalists in her unit used, resulting in report "done in the normal course of business of [the] laboratory." The Evidence Code does not require direct evidence as to the preparation of the specific report in question, but just evidence of its "mode of . . . preparation" (§ 1271, subd. (c)), about which Quinones testified.

Moreover, the present case is distinguishable from *People v. Shirley* (1978) 78 Cal.App.3d 424, where there apparently was no testimony whatsoever offered as to when or how the records in question were prepared, either typically or in that particular instance. (*Id*. at p. 438.) Equally unpersuasive is appellant's reliance on *People v. Grayson* (1959) 172 Cal.App.2d 372, where the appellate court held the trial court did not abuse its discretion in finding no adequate factual foundation to warrant admission into evidence of pages from a hotel register as a business record. The hotel manager had testified that her boss had given her the pages, which were mutilated and cut out from the register. There was no definitive evidence whether the pages were full and complete records, no evidence how or when entries into the hotel register were typically made, and no evidence how or when the pages in question were made. (*Id*. at pp. 379-381.) In contrast to the documents in *Shirley* and *Grayson,* here, there was, as previously discussed, adequate evidence of the lab report as to the customary "mode of its preparation." (§ 1271, subd. (c).)

Appellant's complaint about the lack of evidence of the contemporary nature of the lab report is also unavailing. As respondent acknowledges on appeal, there was no

testimony regarding the actual date the report was prepared. But the sequence of events sufficiently establishes the time frame during which the report was prepared. Appellant was arrested on June 19, 2003, the analysis of the rock cocaine was performed on June 23, 2003, and the preliminary hearing during which defense counsel stipulated the recovered item contained cocaine was on July 10, 2003. Therefore, it is reasonable to conclude that the report was prepared on June 23, 2003, or within a week or so thereafter. Even if the exact date of the report is not in the record on appeal, it is apparent that the report satisfied the business records exception because it was made sufficiently "at or near the time of the . . . event." (§ 1271, subd. (b).)

Furthermore, even if the lab report were not admissible as a business record, it would be admissible as a public records exception to the hearsay rule.[2] The key difference between the two exceptions is that the public records exception does not require a witness to testify as to either the identity of the record or to its mode of preparation. (*People v. Dunlap* (1993) 18 Cal.App.4th 1468, 1477.) Rather, the court may take judicial notice of facts showing the writer's reliability, may rely on the presumption that an official duty has been regularly performed (Evid. Code, § 664), or may use independent evidence suggesting the public record is trustworthy. (*People v. Dunlap*, *supra*, at p. 1479.)

Here, Quinones established the trustworthiness of the author's lab report. As an employee of the police department's crime lab, the author of the report had a duty to observe the facts and report and record them correctly. Quinones identified the lab

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[2] Evidence Code section 1280 provides as follows: "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies: (a) The writing was made by and within the scope of duty of a public employee. (b) The writing was made at or near the time of the act, condition, or event. (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

report, described the procedures used by all criminalists employed in the lab and testified that the procedures were accepted within the scientific community. The report thus could have also been admitted as a public records exception to the hearsay rule. (*People v. Parker* (1992) 8 Cal.App.4th 110, 113-116; see *People v. Campbell* (1994) 23 Cal.App.4th 1488, 1494 ["it is axiomatic that we review the trial court's result, not its rationale"].)

Accordingly, whether analyzed under either the official records exception or the business records exception, the lab report and Quinones's testimony were properly admitted into evidence.

DISPOSITION

The judgment is affirmed.

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BOREN, P.J.

We concur:

NOTT, J.

ASHMANN-GERST, J.